Supreme Court, U.S.
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No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SANDRA HALL,
Petitioner,

vs.

SAVINGS OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At the district court level, Petitioner Sandra Hall ("Hall") sued Respondent Savings of America ("the Bank") for retaliatory termination under the Texas Workers' Compensation Act ("TWCA"), Article 8307c, Revised Civil Statutes of Texas, and under the Texas Commission on Human Rights Act ("TCHRA"), Article 5221k, Revised Civil Statutes of Texas. At the close of all the evidence, the Bank did not make a motion under FRCP, Rule 50(b), for judgment as a matter of law as to the 8307c claim under the TWCA. Hall prevailed at trial, and the Bank appealed. The appellate court reviewed the Bank's appeal under the sufficiency of evidence standard rather than the any evidence standard, and therein reversed and rendered judgment in favor of the Bank.

In its opinion, the circuit court held that Hall's mental impairment affecting her work behavior was not covered by the TCHRA. Additionally, the circuit court held that the TCHRA applied "only" to very severe handicaps ... 'protecting persons with impairments of an incapacitating nature'." The Texas Legislature changed the definition of handicap effective September 1, 1989, to conform with the definition used in the federal statutes. At all times germane to the instant case, the TCHRA at Art. 5221k, Sec. 2.01(4) read: "Disability" means a mental or physical impairment that substantially limits at lease one major life activity or a record of such a mental or physical impairment."

Hall presents the following three questions to the Court:

1. Did the Court of Appeals for the Fifth Circuit erroneously interpret and incorrectly apply Fed. R. Civ. P. 50(b) when it excused the Bank from strict compliance with Rule 50(b);

2. Did the Court of Appeals for the Fifth Circuit so far depart from the accepted and usual course of judicial proceedings in applying the pre-September 1, 1989 standard for disability of TCHRA to a post-September 1, 1989 claim as to call for an exercise of the Supreme Court's power of supervision?

3. Assuming arguendo the circuit court correctly decided the TWCA claim, did the Court of Appeals for the Fifth Circuit so far depart from the accepted and usual course of judicial proceedings in rendering judgment instead of reversing when there was no motion for judgment as a matter of law in the trial court as to call for the exercise of the Supreme Court's power of supervision?

PARTIES TO THE PROCEEDINGS

The parties in this proceeding as listed on the caption are Petitioner Sandra Hall and Respondent Savings of America.

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No. 95-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

SANDRA HALL,

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vs.

SAVINGS OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Sandra Hall ("Hall") respectfully prays that the Supreme Court grant a writ certiorari to review the opinion and the order on petition for rehearing of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions of the courts below have not been published. The Court of Appeals opinion and order are reprinted in Appendices A and B.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was filed on September 14, 1995. Petitioner filed a timely motion for rehearing. The order denying rehearing was filed October 18, 1995. The jurisdiction of this Court is timely invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent portions of the statutory provisions involved in this case, namely, Title 28, Rule 50(b); Texas Commission on Human Rights Act, 71st Leg. R.S. ch 1186, 1989 Texas Sess. Laws (codified as Article 5221k, Tex. Rev. Civ. Statute). Article 5221k, Revised Civil Statutes of Texas, are reprinted in Appendix C. The pertinent excerpts of the trial transcript, which were part of the record on appeal as record excerpts, are reprinted in Appendix D.

STATEMENT OF THE CASE

A. The Facts

The instant case is an employment discrimination case brought by Petitioner Sandra Hall ("Hall") under the Texas Workers' Compensation Act ("TWCA") and the Texas Commission on Human Rights Act ("TCHRA"). The original case filed in Texas state district court was removed to federal court under diversity jurisdiction. 28 U.S.C.

§1441. Hall contends she was retaliated against for filing a claim or initiating a proceeding under the TWCA and was discriminatorily terminated because she was physically and mentally impaired within the meaning of the TCHRA.

At the close of all the evidence, the Respondent, Savings of America ("the Bank"), did not make a motion on the TWCA claim as required under Fed. R. Civ. P. 50(b) for judgment as a matter of law. The jury found in Hall's favor and awarded her $2.3 million in compensatory and punitive damages. The Bank filed for appeal with the Court of Appeals for the Fifth Circuit.

On appeal Hall contended that the standard of review was the "any evidence" standard. Over Hall's objection, the circuit court used the "sufficiency of evidence" standard. Appendix A, pp. 11a-14a. Hall contends that the appellate court applied the incorrect standard of review in deciding the appeal. As the result of the Court's error, Hall was prejudiced by being forced to have her case reviewed by the incorrect and more rigorous "sufficiency of evidence" standard rather than the correct and less rigorous "any evidence" standard. The circuit court reversed and rendered judgment for the Bank. Appendix A, p. 24a.

In determining Hall's TCHRA claim for mental and physical disability discrimination, the circuit court held on the physical disability claim that the "TCHRA applies only to very severe handicaps — 'protecting persons with impairments of an incapacitating nature.' Chevron Corp. v. Redmon, 745 S.W.2d 314, 317-18 (Tex. 1987)." Appendix A, p. 23a. On the disability claim for discrimination for mental impairment, the Court held that the TCHRA did not apply to Hall. Appendix A, p. 24a. The appellate court reasoning was based on the TCHRA as

it existed **prior** to being amended by the Texas Legislature effective September 1, 1989. Central Power & Light Co. v. Caballero, 804 S.W.2d 534, 537 (Tex. App.--San Antonio 1990), overruled on other grounds at 858 S.W.2d 359 (Tex. 1993). See Appendix C.

B. Law

It has long been the law that judgment notwithstanding the verdict [now judgment as a matter of law] can not be considered in the absence of a timely motion for a directed verdict. Indamer Corp. v. Crandon, 217 F.2d 391, 393 (5th Cir. 1954).

It is well-established law that "sufficiency of the evidence is not reviewable on appeal unless a motion for a directed verdict was made in the trial court at the conclusion of all the evidence." McConn v. Texas City Refining, Inc., 984 F.2d 667, 671 (5th Cir. 1993). [Emphasis added.] The Courts have adhered to the longstanding rule that the introduction of evidence after a motion for judgment is denied "constitutes a waiver of the objection to the sufficiency of the evidence unless a motion is renewed at the time all the evidence is in ... [and] that [the] party [not renewing the motion] may not challenge the sufficiency of the evidence on appeal." 5A Moore's Federal Practice, Section 50.05[1].

This Supreme Court has long held, and still holds, that strict compliance with the procedural requirements of Fed. R. Civ. P. 50(b) is the law. Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 325, 18 L.Ed.2d 75, 82, 87 S.Ct. 1072 (1967) [holding "an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b)...." More than one and one-half decades prior to

Neely, this Supreme Court observed:

> Rule 50(b) as written and as construed by us is not difficult to understand or to observe. Rewriting the rule to fit counsel's unexpressed wants and intentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was adopted to end. In 1946 this Court was asked to adopt an amendment to the rule which would have given appellate courts power to enter judgments for parties who, like this respondent, had made no timely motion for judgment notwithstanding the verdict. We did not adopt the amendment then. 5 Moore, Federal Practice (2d ed. 1951) ¶¶ 50.01 [7], 50.01 [9], 50.01.

Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48, 53, 97 L.Ed.2d 77, 73 S.Ct. 125, 128 (1952).

As far back as 1908 in the case McCabe & Steen Construction Co. v. Wilson, 209 U.S. 275 (1908), when the verdict loser attempted to appeal, this Supreme Court ruled:

> When the plaintiff rested the court overruled a demurrer to the evidence. This ruling, however, cannot avail the defendant, whatever the defects then in the case, for thereafter it proceeded to introduce testimony in its own behalf, and this waived any supposed error.

In recent years this Court has reaffirmed its position on the importance that procedural requirements be met. In the

civil rights case of Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152, 80 L.Ed.2d 196, 202, 104 S.Ct. 1723 (1984), this Court stated:

> Procedural requirements established by the Congress ... are not to be disregarded by the courts out of a vague sympathy for particular litigants. As we stated in Mohasco Corp. v. Silver ... [citation omitted], 'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'

Although the circuits are in conflict, most circuits adhere strictly to the congressional intent and the Supreme Court's interpretation of Rule 50(b). The Third and Sixth Circuits adhere rigidly to the letter of Rule 50(b). Yohannon v. Keene Corp., 924 F.2d 1255, 1262 (3rd Cir. 1991); Libbey-Owens-Ford v. Insurance Co. of N. America, 9F.3d 422, 426-27 (6th Cir. 1993). The First Circuit in Justino v. Zayas, 875 F.2d 986, 992 (1st Cir. 1989), required strict adherence to the procedural requirements of Rule 50(b), as did the Eighth Circuit in Hubbard v. White, 755 F.2d 692, 696 (8th Cir. 1985), cert. denied 106 S.Ct. 107, 474 U.S. 834, 88 L.Ed.2d 87 (1985); the Ninth Circuit in Johnson v. Armored Transport of California, Inc., (9th Cir. 1987); the Tenth Circuit in Trotter v. Todd, 719 F.2d 346, 350 (10th Cir. 1983); the Eleventh Circuit in US for Use & Benefit of Roper, IBG, A Div. of Roper Corp. v. Relsz, 718 F.2d 1004 (11th Cir. 1983); and, the District of Columbia in Alston v. Bowins, 733 F.2d 161 (D.C. Cir. 1984).

The Second and the Seventh Circuits, along with the Fifth Circuit, have sometimes applied a more flexible

approach to administering Rule 50(b). Abeshouse v. Ultragraphics, Inc., 754 F.2d 467, 473 (2nd Cir. 1985); McKinnon v. City of Berwyn, 750 F.2d 1383, 1390 (7th Cir. 1984).

Normally, the Fifth Circuit has applied Rule 50(b) strictly. See, for example: Wells v. State Farm Fire and Cas. Co., 993 F.2d 510, 512 (5th Cir. 1993); Bunch v. Walter, 673 F.2d 127, 130 n.4 (5th Cir. 1982), quoting Coughlin v. Capitol Cement Co., 571 F.2d 290, 297 (5th Cir. 1978); Steverson v. Goldstein, 24 F.3d 666, 669 (5th Cir. 1994). In Wells, the Fifth Circuit held that "recent amendments [to Rule 50, Fed. R. Civ. P.] do not change the requirement that a party seeking judgment as a matter of law state with specificity the reasons for the judgment in its motion after the close of all the evidence and before the case is submitted to the jury if there is going to be a challenge to the sufficiency of the evidence." Without a timely motion for judgment as a matter of law, review is "limited to considering whether there was any evidence to support the jury's verdict, or whether plain error was committed which, if left uncorrected, would result in a manifest miscarriage of justice." Id., 513, citing Coughlin v. Capitol Cement Co., supra.

Notwithstanding case law in the circuit and in apparent disregard for stare decisis, the Fifth Circuit carved out an exception to Rule 50(b) in the instant case holding "we exclude Savings' technical noncompliance with 50(b) under the circumstances extant in this case because we are convinced the purpose of the rule has been served." Appendix A, pp. 11a-14a generally and p. 13a.

At the close of Hall's evidence, the Bank moved for a directed verdict (sic) on both the TWCA and TCHRA claim. Id. The trial court said it would allow the Bank to

supplement its motion at the completion of the case. Appendix D. At the close of Hall's evidence, the Bank made the following motion:

> Bank's Attorney:
>
> There's no evidence and insufficient evidence to support the allegation that plaintiff's troubles stemmed from the filing of any workers' comp claim or have any protected disability pursuant to the Texas Commission on Human Rights Act.
>
> I would also move for instructed directed verdict because there is no disability, no evidence of disability as defined and as protected pursuant to the Texas Commission on Human Rights Act.
>
> I would also move for instructed directed verdict because there is no evidence of a duty to make reasonable accommodations; and yet as a matter of law, reasonable accommodation, more than reasonable accommodation has been the subject of this evidentiary record and proven.
>
> What else? There was one other thing, if I can just think a second.
>
> The Court:
>
> Let me emphasize, to the extent that you may have missed something, you have the right to supplement your motion at the completion of the case and its timely in all

elements under Rule 50 (a)(2). So I'm not going to preclude you. You may supplement on anything appropriate.

Appendix D, Tr. Trans. pp. 470-71.

At the close of all the evidence, the Bank's attorney made the following motion:

Bank's Attorney:

Comes now Savings of America, defendant, and requests judgment entry by the Court on grounds that plaintiff has failed to produce evidence of a disability in this case, as that term is defined in the Texas Commission of Human Rights Act.

The Court:

That motion is respectfully denied. The Court feels rather strongly that the plaintiff has demonstrated rather compelling testimony of such stated statutorily mandated or defined disability. Consequently the motion is denied.

Anything further for plaintiff?

Hall's Attorney:

No, Your Honor. Thank you.

The Court:

All right. And anything further for defendant?

Bank's Attorney:

Nothing, Your Honor.

Appendix D, Tr. Trans. pp. 568-569.

The Bank never supplemented its motion at any time before or after the close of all the evidence. Appendix D. At the close of all the evidence, the Bank did make a motion for a directed verdict (sic) on the TCHRA claim but ignored the TWCA claim. In fact, the trial judge gave the Bank a second opportunity when after denying the Rule 50(b) motion as to the TCHRA claim, the judge asked the Bank's attorney if the Bank had "anything further" for the Bank. Appendix D. The Bank's attorney replied, "Nothing, Your Honor." Id.'

In 1983 in Bohrer v. Hanes Corp., 715 F.2d 213, 217 (5th Cir. 1983), cert. denied 465 U.S. 1026, 79 L.Ed.2d 687, 104 S.Ct. 1284 (1984), the Fifth Circuit carved out an exception to the strict application of the procedure requirements of Rule 50(b). [The Fifth Circuit in Bohrer ignored Rule 50(b)'s strict procedural requirement on the grounds that the purpose of the rule (to enable the trial court to re-examine the question of evidentiary insufficiency as a matter of law and alert the opposing counsel of the insufficiency before the case is submitted to the jury) had been served. Id., 216-217.] The exception to Rule 50(b) was followed in 1992 in Davis v. First Nat. Bank of Killeen, Tex., 976 F.2d 944, 948-49 (5th Cir. 1992). See also, Merwine v. Board of Trustees, 754 F.2d 631, 635 (5th Cir.

1985), cert. denied 474 U.S. 823, 88 L.Ed.2d 62, 106 S.Ct. 76 (1985).

The TCHRA was amended effective September 1, 1989, deleting the former narrow definition of "handicapped" and substituting the broader term "disabled". Appendix C. See especially Section 1(2); Section 2(b); Section 3 amending Section 2.01 at (1)(4)(5)(9) [amending (7)(A)]. Appendix C. See also, Texas Revised Civil Statutes, Article 5221k. Appendix C. See Central Power & Light v. Caballero, 804 S.W.2d 534, 537 (Tex.App.--San Antonio 1991), overruled on other grounds 858 S.W.2d 359 (Tex. 1993).

Hall claimed both mental and physical disability. As to mental disability, the circuit court held it was "not persuaded that Hall's problem and stress rose to the level of a disability within the meaning of TCHRA." Appendix A, p. 21a. As to Hall's disability stemming from carpal tunnel syndrome, the circuit court opined: "TCHRA applies only to very severe handicaps--'protecting persons with impairments of an incapacitating nature! Chevron Corp. v. Redmon, 745 S.W.2d 314, 317-18 (Tex. 1987)." Appendix A, p. 23a. The only disability law authorities cited by the circuit court are four cases, to-wit: Daley v. Koch, 892 F.2d 212 (2nd Cir. 1989); Elstner v. Southwestern Bell Tel. Co., 659 F.Supp. 1328, 1345 (S.D. Tex. 1987), aff'd 863 F.2d 881 (5th Cir. 1988); Chevron, supra.; and, Chandler v. City of Dallas, 2 F.3d 1385, 1397 (5th Cir. 1993). Appendix A, pp. 21a-23a. All Texas authorities used by the circuit court apply to occurrences under the TCHRA prior to September 1, 1989, or relate to Texas law prior to September 1, 1989. Hall's case involves disability discrimination after September 1, 1989. In fact, there are no occurrences in Hall's case dating prior to September 18, 1990. Appendix A, p. 4a. The Court used the wrong

definition in determining whether there was sufficient evidence to support the TCHRA claim.

The case of Finney v. Baylor Medical Center Grapevine, 792 S.W.2d 859 (Tex. App.--Ft. Worth, 1990), no writ, decided under the pre-1989 TCHRA, involved an employee whose mental impairment was identical to Hall. Finney, like Hall, involved an employee whom the employer alleged had a work environment behavior problem. In Finney the court found that the employee's impaired ability to control her behavior in the workplace was not excluded from coverage as a disability/handicap under the TCHRA. Finney is in sharp contrast to the circuit court's cavalier dismissal of Hall's disability under the rationale: "Although Hall had personality problems and was under stress, she was not 'disabled' under TCHRA." Appendix A, p. 22a. Since the TCHRA's 1989 amendments extended coverage to impairments previously excluded, Finney is strong authority for Hall.

In Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48, 97 L.Ed.2d 77, 73 S.Ct. 125 (1952), this Court held that where a defendant has made a timely motion to set aside a verdict and for a new trial but has failed to move for a judgment NOV, such defendant is entitled only to a new trial and not a judgment in its favor. The Fifth Circuit holding in Matthias v. Bingley, 906 F.2d 1047, 1051 (5th Cir. 1990), is consistent with Johnson, supra. In Matthias the verdict loser made a timely motion for a directed verdict but did not move for judgment NOV. In Matthias the Court held that because the verdict loser "did not move for a judgment n.o.v., we may not reverse and render a judgment in favor of ... [verdict loser] if we are so inclined. Instead we only may reverse and order a new trial." at 1051.

C. Conflicts Among the Circuits

There exists a significant conflict between the Third and Sixth Circuits on one hand and the Second, Fifth and Seventh Circuits on the other hand as to the interpretation of Rule 50(b). Further, the First, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits all appear to follow the same construction of Rule 50(b) as do the Third and Sixth Circuits. The loose interpretation of Rule 50(b) by the Second, Fifth and Seventh Circuits is in significant conflict with the strict interpretation of Rule 50(b) by the First, Third, Sixth, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits. The conflict must be clarified by this Court.

D. The Court's Power of Supervision Is Required

There is no basis in fact or law to support the circuit court's ruling in this case with regard to applying the incorrect definition of disability under Article 5221k of the Texas Revised Civil Statutes. Such serious error can only be corrected by the supervision of this Court to correct in the name of manifest justice.

Assuming arguendo that the circuit court correctly reversed the TWCA claim, there is no basis in fact or law allowing the Fifth Circuit to render judgment. As a matter of law, the circuit court is limited to remanding this case for a new trial. Such serious error requires the supervision of this Court to correct in the name of manifest justice.

REASONS FOR GRANTING THE WRIT

In the instant case, the circuit court rendered a decision involving the interpretation of Fed. R. Civ. P. 50(b) which is in conflict with other circuits. This Court must resolve the conflict to insure uniformity and

predictability of the law. The loose interpretation of Rule 50(b), by the Fifth Circuit especially, erodes the power and function of this Court and of Congress.

In using the incorrect definition of disability under the TCHRA, the Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings that it requires the supervision of this Court.

Further, in the alternative, if the circuit court correctly reversed Hall's TWCA claim, in rendering judgment in the absence of a motion for judgment NOV in the trial court, the Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings that it requires the supervision of this Court.

CONCLUSION

For the reasons stated above, namely the erroneous interpretation and application of Fed. R. Civ. P. 50(b), use of the incorrect definition of a disability under Texas law at Article 5221k, or in the alternative, rendering judgment without authority rather than reversing for a new trial as to TWCA, Petitioner Sandra Hall requests the Court to issue writ to review the decision of the Court of Appeals for the Fifth Circuit.

Dated: January ___, 1996.

Respectfully submitted,

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APPENDICES

Appendix A

APPENDIX A - OPINION
FILED SEPTEMBER 14, 1995
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60091

SANDRA R. HALL,

Plaintiff-Appellee,

VERSUS

SAVINGS OF AMERICA,

Defendant-Appellant

Appeal from the United States District
Court for the Southern District of Texas

Before HIGGINBOTHAM, SMITH and STEWART, Circuit Judges.

Appendix A

CARL E. STEWART, Circuit Judge:*

This is a wrongful termination case in which the jury awarded plaintiff Sandra Hall $2.3 million in compensatory and punitive damages based on her claims of retaliatory discharge under the Texas Worker's Compensation Act[1] (TWCA) and disability discrimination under the former Texas Commission on Human Rights Act[2] (TCHRA). On appeal, Savings of America challenges the sufficiency of the evidence as to both the TWCA and the TCHRA claims, attacks the damages awards on several bases, and maintains that the district court instructed the jury erroneously and submitted an incorrect interrogatory on the verdict form. Because we are convinced that no reasonable jury could have concluded that a violation of the TWCA or TCHRA had occurred, we REVERSE and render judgment in favor of the defendant, Savings of America.

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[1]*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]TEX. REV. CIV. STAT. ANN. article 8307c

[2]TEX. REV. CIV. STAT. ANN. article 5221k, now found at Chapter 21 of the Texas Labor Code. *See* TEX. LAB. CODE ANN. & 21.001-.262.

Appendix A

Background Facts

Hall was a long-term employee of Savings of America, working in Houston, Texas, as a senior coordinator of a Career Awareness Program (CAP) run by Savings to teach employment and job hunting skills as well as provide scholarships to "at-risk" inner city teenagers. Students finishing in the top ten per cent of the CAP program were given summer jobs at Savings. Hall's job was roughly analogous to a teaching position. Hall conducted after-school classes at area high schools, administered exams, graded papers, and took students on field trips geared toward educating them on opportunities in the banking industry. The position allowed for a great deal of autonomy and independent work; Hall's immediate supervisor, Judy Morgan-Phillips, was located in Irwindale, California, at Savings' home office. Hall had a good work history with Savings. Morgan-Phillips had rated Hall "outstanding" in the company's annual job performance appraisals for several years immediately prior to her termination.

Beginning in 1985, while pregnant with her first child, Hall began to experience pain and tingling in her hands. When the pain did not subside after her child was born, Hall began seeing a doctor for the problem. She was diagnosed with carpal tunnel syndrome[3] in both hands. In June 1990,

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[3]Carpal tunnel syndrome is a condition in which a person experiences tingling, "pins and needles", burning, numbness, and pain in the

Hall underwent surgery on her right hand. While off from work recovering from the surgery, Hall continued to be paid 100% of her salary through Savings' extended paid absence program (EPA). On August 15, 1990, Hall was told by her doctor that her carpal tunnel syndrome was possibly work related.[4]. On August 28, 1990, Hall returned to work after the surgery. On September 18, 1990, Hall reported to Savings that her carpal tunnel was possibly a work related injury.

The record contains somewhat conflicting testimony as to whether Hall wanted to file a worker's compensation claim at that time. Hall contends that she wanted to file a claim but was told that she would have to refund the money paid to her during her EPA before she could file a claim.[5]. The documentary evidence supports Hall's assertion that she was in fact told that she would have to refund any EPA money she received before filing a worker's compensation claim. However, it also indicates that Hall affirmatively decided that she would not pursue worker's compensation at that point. It

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fingertips or hand because a major nerve located in the wrist has become compressed by bones or ligaments.

[4]In addition to teaching, Hall's job duties included typing on a computer and handling student files. Repetitive manual tasks such as these are often linked to the cause of carpal tunnel syndrome.

[5]The information given to Hall was erroneous. The law does not require that a claimant refund such money prior to filing a claim. *See* TEX. REV. CIV. STAT. ANN. article 8308-4.06(f) [remodified at TEX. LAB. CODE ANN. § 408.003(d)(2)].

is unclear whether Hall's decision was driven primarily because of the erroneous information given her by Morgan-Phillips regarding the need to refund EPA money. In any event, Hall did not further pursue a worker's compensation claim at that point.

Hall contends that Morgan-Phillips' attitude toward her changed drastically from the moment she reported that her carpal tunnel syndrome was possibly work related. Although the two had enjoyed a friendly relationship in the past, Hall testified that, beginning in September 1990, Morgan-Phillips began to be very "cool" and "professional" when dealing with her. Morgan-Phillips testified that Hall was the one who "changed" around that time. Hall had gotten married during the summer of 1990 and had acquired five new stepchildren in addition to her own two children. Morgan-Phillips testified that Hall had experienced some family problems around that time, and that she had suggested that Hall take advantage of counseling available through a program at Savings, but that Hall had refused.

In any event, the record is clear that the relationship between the two began to deteriorate in the fall of 1990. The problems never did improve but instead grew steadily worse. In January, 1991, Hall took another leave of absence for a second carpal tunnel surgery, this time on her left hand. She was off work from January 16, 1991 until April 1, 1991. As with the first surgery, Hall was paid 100% of her salary while off work through the company's EPA program. The testimony at trial indicates that the real unraveling between Hall and

Appendix A

Morgan-Phillips may have occurred while Hall was out on leave during her second surgery. While Hall was recovering, Savings sent a program coordinator from Irwindale to teach the CAP classes in her absence. Although Hall was on leave, she would come into the office after hours and on weekends to check her mail and leave messages for the substitute coordinator, Alice Young. When Morgan-Phillips learned of this, she asked that Hall not enter the premises while out on EPA, apparently because of a liability concern. Hall did not take this mandate well. She began to have problems not only with Morgan-Phillips but with Young, communicating with her by telephone from home. Once Hall returned to work on April 1, 1991, Morgan-Phillips had Young remain in Houston for a while to help Hall make the transition back. Young later returned a second time to provide further assistance in lightening Hall's workload by wrapping up classes for the semester. The record is clear that the friction between Hall and Young quickly escalated to the point that they could not work together at all. Young and Morgan-Phillips were not the only ones with whom Hall had problems: she also had problems with the program coordinator in Dallas, who at that time reported to Hall. In response to the Dallas coordinator's complaints, Morgan-Phillips modified the chain of command, instructing the Dallas office to report directly to Irwindale. Hall apparently viewed this as a demotion and became even more unhappy. The record also reflects that other of Hall's coworkers began to complain about her, and that eventually even some of the school principals and counselors at the high schools voiced complaints. Morgan-Phillips clearly blamed Hall for the problems she was having in getting along with

others. She formally counseled[6] Hall about the situation by telephone on April 24, 1991.

On May 2, 1991, another incident occurred. Hall visited a neurologist, who put her on immediate medical leave for work-related stress. Rather than telephoning Irwindale and informing Morgan-Phillips that she would be off work, Hall sent written notice of her leave status to Morgan-Phillips via express mail; however, the correspondence was misplaced and Morgan-Phillips never saw it. Apparently Morgan-Phillips was not aware that Hall was out of the office until May 10, 1991. She called Hall at home and formally counseled her for not informing her by telephone about her leave status. Morgan-Phillips also counseled Hall about unilaterally canceling, without authority, Savings' participation in an awards ceremony at one of the high schools in the CAP program. She told Hall that any further occurrences of a similar nature would subject her to immediate termination.

On May 13, 1991, Hall returned to work. At some point during May or June 1991, Jay Josephson, Savings' human resource manager, filed a worker's compensation claim

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[6]"Counseling" is a term-of-art, which refers to the second level of Savings' progressive disciplinary process used to address an employee's deficiencies. Savings first employs a "record of discussion" (an informal discussion between supervisor and employee), then it uses "counseling" (formal communications identifying the area in which the employee needed improvement and notifying the employee that failure to improve could result in further reprimand or termination).

on behalf of Hall for job related stress. He noted on the claim form that Hall had not reported it as a work related injury. Hall apparently did not pursue the claim. The record contains scant evidence of any worker's compensation activity.

On June 19, 1991, Morgan-Phillips put Hall on medical leave pending a letter from her doctor regarding her condition.[7] It took the doctor almost a month to respond. The doctor's letter indicated that Hall was free to return to work but noted that Hall had reported pain, primarily in her right hand, which she attributed to "too many work-related activities." The letter suggested "it may be beneficial if [Hall's] workload cap be legitimately reduced for a 6-12 month period to determine if her discomfort may be alleviated."

Upon receipt of the letter, Josephson contacted Hall's doctor to clarify her medical restrictions. The doctor articulated that Hall should not engage in any repetitive heavy lifting, such as lifting stacks of books. The doctor was of the opinion that Hall could perform her job duties, including typing and keyboard use, so long as this use was intermittent and not her only activity for an eight hour day.

Based on this information, Morgan-Phillips sent a memo to Hall stating that although Savings would accommodate the restrictions articulated by Hall's doctor, she

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[7]This "involuntary" medical leave apparently was prompted by a memorandum Hall had sent to Morgan-Phillips complaining about pain in her arm.

expected Hall to do her job. Part of Hall's job was to submit monthly reports and time management logs to Morgan-Phillips. These documents had to be prepared on the computer.[8] Our review of the time management logs reveals that they would require a fair amount of typing, with numerous entries recording Hall's activities throughout the day, including phone calls, appointments, etc. On July 26, 1991, Hall left for her vacation at one of the company's condominiums without first submitting her monthly report, which was due, although she did turn in her time management log. When Hall returned from vacation, Morgan-Phillips terminated her. Morgan-Phillips contends that she had previously told Hall she would consider her vacation request after receiving the monthly report and time management logs but that Hall had taken the vacation without Morgan-Phillips' authorization and knowledge. Thus, Savings contends that Hall was fired for insubordination. Hall maintains that the monthly report and time management log were not a stipulated pre-condition for her vacation, and that Savings' claim of insubordination was pretextual.

Analysis

As noted above, dual theories of liability based upon worker's compensation claim retaliation and upon disability

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[8] Although Morgan-Phillips had told Hall she could handwrite the time management logs, Hall testified at trial that, because she had to wear braces on both hands following her surgery, her handwriting was so poor even she could barely read it.

discrimination were alleged in this case. Hall contends that Savings fired her, not for insubordination, but because she had made a worker's compensation claim and because she was disabled. The jury found that Savings violated both the TWCA and TCHRA. In this opinion, we deal with each of the plaintiff's claims in turn.

Savings contends that Hall had "maxed out" at her pay scale and became frustrated in her job, gradually degenerating into open warfare with her colleagues, school officials, and her supervisor. Savings claims that the denouement occurred when Hall took what it claims was an unauthorized vacation after refusing to complete a mandatory assignment that it contends was a pre-condition for consideration of her vacation request. Savings claims this final act of insubordination capped off the worsening pattern of fractious and insubordinate behavior which had begun to preoccupy the entire CAP department in both Houston and Irwindale.

Hall claims that the insubordination claim was pretextual, and that she was really fired because she had carpal tunnel syndrome and reported it as work-related.

Worker's Compensation Claim

The jury found that Savings fired Hall at least in part in retaliation for filing a worker's compensation claim. On appeal, Savings argues that the evidence does not support such a conclusion. Thus, Savings contends that the district court erred in not granting its judgment as a matter of law.

Appendix A

Standard of Review

The parties are in dispute over the applicable standard of review on appeal. Hall argues that because counsel for Savings did not renew his motion for judgment as a matter of law as to the worker's compensation retaliation claim at the close of all the evidence as required by Fed. R. Civ. P. 50(b), then we should review the jury verdict under the "any evidence standard.

Sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law is made at the conclusion of all the evidence. McCann v. Texas City Refining Inc., 984 F.2d 667, 671 (5th Cir. 1993). Absent such a motion, the appellate court reviews the evidence only to ascertain whether there was any evidence to support the jury's verdict, irrespective of its sufficiency or whether plain error was committed which, if not noticed, would result in a manifest miscarriage of justice. Wells v. State Farm Fire and Cas. Co., 993 F.2d 510, 512 (5th Cir. 1993).

Savings admits that it did not move for judgment as a matter of law as to the worker's compensation claim at the close of all the evidence, but points out that, at the close of Hall's case-in-chief, Savings had moved for directed verdict as to Hall's claims under both TCHRA and the TWCA. The motion was denied. After the close of Savings' case-in-chief[9]

[9]Savings' case-in-chief was comprised of the testimony of just one witness.

and closing arguments, Hall moved for judgment as a matter of law, which was denied. Savings then renewed its motion for judgment as a matter of law, but this second time Savings' counsel referred only to the claim under TCHRA, not the TWCA claim. Savings' renewed motion was denied.

Savings points out that although counsel did not mention the TWCA claim when it renewed its previous motion at the close of all the evidence, we should nonetheless excuse its technical noncompliance with Fed. R. Civ. P. 50(b). We agree.

This Court has emphasized that the application of Rule 50(b) "should be examined in the light of the accomplishment of [its] particular purpose[s] as well as in the general context of securing a fair trial for all concerned in the quest for truth." Merwine v. Board of Trustees, 754 F.2d 631, 634 (5th Cir.), cert. denied., 474 U.S. 823, 106 S. Ct. 76, 88 L. Ed. 2d 62 (1985); Bohrer v. Hanes Corp., 715 F.2d 213, 217 (5th Cir. 1983), cert. denied, 465 U.S. 1026, 104 S. Ct. 1284, 79 L. Ed. 2d 687 (1984).

Savings argues that the facts in this case are similar to those in Bohrer. In Bohrer, defendants moved for directed verdict at the close of plaintiff's case. A ruling was reserved. Defendants then introduced evidence adverse to plaintiff. Plaintiff offered no rebuttal evidence. Defendants did not renew their motion at the close of all evidence. The Bohrer court held that the defendants' technical non-compliance with Rule 50(b) was excused because the purposes of Rule 50(b)

had been served. The purpose of the rule is to enable the court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury, thereby affording it an opportunity to cure any defects in proof. Merwine, 754 F.2d at 634.

While it is certainly the better and safer practice to fully renew a judgment as a matter of law at the close of all the evidence, we excuse Savings' technical noncompliance with 50(b) under the circumstances extant in this case because we are convinced that the purposes of the rule have been served. Moreover, the trial transcript reveals that the district judge was in large part responsible for Savings' counsel's noncompliance. When counsel for Savings moved for instructed directed verdict at the close of the plaintiff's case-in-chief, the district court cut counsel short and said he would allow the motion to be supplemented at the close of all the evidence.

The Court then told counsel that Savings' motion was acknowledged "on a timely basis for all purposes," and that "it constitutes the record for appellate scrutiny." Savings then presented its case, one witness comprising five pages in the record. Hall offered no rebuttal. Savings argues that it relied on the Court's advice that the motion would remain open until the end of the case. By using the word "supplement" the Court directed Savings to add anything he might have "missed" at the close of Hall's case. The Court emphasized there was

no need to renew motions already urged, only a need to supplement. Thus, at the end of the case, counsel for Savings supplemented the motion, adding the specific reference to plaintiff's TCHRA claim to its motion for judgment as a matter of law.[10]

Because we excuse Savings' technical noncompliance with Rule 50(b), we reject Hall's argument that the "any evidence" standard should be employed. Instead, we employ on appeal the same standard the district court used in ruling on the defendant's motions:

> [T]he Court should consider all of the evidence--not just the evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper.

Parham v. Carrier Corp., 9 F.3d 383, 386 (5th Cir. 1993), citing Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

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[10] Actually, counsel for Savings had already referred to the TCHRA claim when moving for judgment as a matter of law at the end of the plaintiff's case-in-chief.

Appendix A

Was the evidence sufficient to support the TWCA verdict?

Savings contends that Hall has not presented sufficient evidence to establish the causal connection between her worker's compensation claim and her termination. Savings also-points out that its own human resources manager filed the worker's compensation claim for Hall. Thus, it was encouraging, rather than discouraging, Hall's worker's compensation activity. Additionally, Savings contends that the overwhelming evidence showed that Hall's repeated misconduct caused her termination to such a degree that, viewing all of the evidence, a reasonable jury could not have awarded recovery to Hall.

Hall's retaliatory discharge claim was based on article 8307c of the Texas Workers' Compensation Act, which reads in pertinent

part :

> No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act or has testified or is about to testify in such proceeding.

TEX. REV. CIV. STAT. ANN. ART. 8307C, § 1.

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To recover for retaliatory discharge, an employee bringing suit under the TWCA must show that: (1) the employer discharged the employee (2) because he or she in good faith filed a worker's compensation claim, and (3) the employer's conduct resulted in damages to the employee. Azar Nut Co. v. Caille, 720 S.W.2d 685 (Tex. App. -- El Paso 1986), aff'd, 734 S.W.2d 667 (Tex. 1987).

Thus, in order to recover under the TWCA, the plaintiff bears the burden of establishing a causal nexus between his worker's compensation activity and his discharge. The plaintiff need not prove that his quest for worker's compensation was the sole reason for his discharge, but he must establish that it was a determining factor. Parham v. Carrier Corp., *supra*, 9 F.3d at 386.

If the plaintiff establishes the causal link, the employer may rebut the alleged discrimination by showing a legitimate reason for the discharge. Swearingen, 968 F.2d at 562. If the employer furnishes a legitimate reason, the employee must show that this reason is but a pretext and that the worker's compensation claim was, in fact, a determining factor. The Texas Supreme Court recently reaffirmed the principle, generally applicable in employment discrimination cases, that in cases of alleged discrimination under the worker's compensation statute, where an employer articulates a legitimate, non-discriminatory reason for the discharge," the employee must "produce evidence of retaliatory motive." Texas Division-Tranter. Inc. v. Carrozza, 876 S.W.2d 312 (Tex. 1994) (per curiam).

Appendix A

We have carefully reviewed the record to determine whether a reasonable jury could-have concluded that Savings' claim of insubordination was pretextual, and that Hall was actually fired in retaliation for her claim of work-related injury. We have determined that the evidence was not sufficient, when viewed in a light more favorable to affirming the jury verdict, for a reasonable jury to so conclude.

At trial, Hall attempted to use statistical evidence to prove that Savings has a history of terminating employees who make workers compensation claims. In Parham, *supra*, 9 F.3d at 388, we noted that a pattern of firing employees who have filed compensation claims could be probative of retaliatory discharge. However, we have carefully reviewed the statistical information in the record regarding the number of employees who filed workers compensation claims and who were subsequently involuntarily terminated, and we find no such pattern. We find the number of involuntary terminations following worker's compensation activity to be very small at Savings. One of the terminated employees, a bank teller, was fired two years after filing a claim. She apparently had failed to follow company procedures with regard to a transaction, and her error cost the company several thousand dollars. Her termination is not probative of a pattern of retaliation.

However, Hall presented other evidence to establish retaliatory motive. Hall attempted to paint a picture of Savings' hostility toward worker's compensation claimants through the use of a 1984 memorandum from its then-President, Mario Antoci. The Antoci memo was directed

to the subject of industrial accidents and expressed a concern about the cost of worker's compensation insurance to the company. In it Antoci requested that Savings managers, loan officers, and department heads hold regular safety meetings with staff members. He states that "[i]t is imperative that the employees are made aware of the effect carelessness has on our 'bottom line.' Please stress that expenses caused by negligence will not reflect well on the employee nor on the department manager where the employee works, where a pattern of carelessness seems apparent."

Hall points to the Antoci memo as evidence of a corporate policy of hostility toward claimants. Hall's position is that the memo contains a direct threat of retaliation against those who file claims for job related injuries. Thus, Hall submits that it establishes a causal nexus between her workers compensation activity and her termination.

We have carefully reviewed the Antoci memo. We are not persuaded that it provides more than a scintilla of evidence of corporate hostility toward worker's compensation claimants at Savings. Moreover, we note that although the tenor of the memo could arguably be construed as somewhat stern, it is geared toward avoiding unnecessary workplace accidents which occur because of carelessness, rather than the type of malady with which Hall was afflicted. As Parham, supra, 9 F.3d at 387, makes clear, improved safety is a legitimate corporate goal. Moreover, the lack of temporal proximity between the 1984 memo and Hall's termination in

1991, some seven years later, disqualifies the memo as the sort of evidence which is sufficient to establish causation.

In addition to Hall's testimony that Morgan-Phillips' attitude toward her changed drastically the moment she report her work-related injury, Hall offers other circumstantial evidence as proof that there was a causal connection between worker's compensation activity and her termination. For example, she was denied summer help for the first time in eleven years. Hall submits that this sort of circumstantial evidence establishes the causal connection between the filing of her claim and her termination.

We have carefully reviewed the entire record in the light most favorable to Hall. However, we simply cannot find sufficient evidence of a causal connection between the filing of the worker's compensation claim and Hall's termination. We are persuaded that no reasonable jury, looking at all the evidence, could conclude that Hall was fired for any reason other than her insubordination and misconduct. Although there may have been a misunderstanding as to whether or not the vacation request was conditioned upon turning in the requisite report and log, it is clear that the relationship between Morgan-Phillips and Hall had deteriorated to the point that a working relationship had become impossible and that the reason for the termination was not pretextual. Hall admitted that she was the problem at that time. She also admitted to making several comments which are clearly insubordinate, such as telling Morgan-Phillips she was out of line and saying she did not want to hear anything more from her. She also

admitted that she told Morgan-Phillips she was writing down everything she said. We are therefore faced with an abundance of evidence to support the reasons forwarded by Morgan-Phillips as prompting the termination, while there is an utter dearth of evidence indicating that Hall's claims of worker's compensation retaliation have any merit. Thus, we find that the evidence does not support the jury verdict as to the TWCA claim, and accordingly, we reverse the verdict.

Was the evidence sufficient to support the TCHRA verdict?

We note at the outset that, just as Hall presented dual theories of liability under both the TWCA and TCHRA, she in turn presented the handicap discrimination aspect of her case under a "dual theory." Hall claimed that she was disabled not only by carpal tunnel syndrome but also by emotional problems, which she argued were caused by the pain and stress she experienced concomitant to the carpal tunnel syndrome.

Mental Disability?

At trial, although dual theories of disability were forwarded, Hall's counsel presented this case primarily as one in which Hall's stress was highlighted more than the carpal tunnel syndrome. For example, counsel argued that Savings should have forced Hall into psychiatric/psychological counseling under threat of termination prior to actually firing her. Thus, Hall argued that Savings did not reasonably accommodate Hall's mental "disability."

Appendix A

We have carefully reviewed the record to determine whether a reasonable jury could have concluded that Hall was mentally disabled at the time she was terminated. Although it is clear that this was a difficult period in Hall's life, we are not persuaded that Hall's problem and stress rose to the level of a disability within the meaning of TCHRA. Although Hall testified at trial about how much stress she was under and that she definitely had a "problem" at that time in her life, the evidence adduced is insufficient to establish that Hall was mentally handicapped or, for that matter, that Savings had notice of any real emotional or mental problem. In fact, the only reference in the record to any real mental or emotional problems, other than Hall's own testimony, is the reference to the medical leave taken by Hall in May 1991 for work-related stress and the worker's compensation claim Josephson filed for her shortly after. Even Hall's own doctor did not refer to any mental or emotional disorder in her "work limitations" letter to Savings in July 1991. Moreover, although Hall's testimony was poignant and candid in that she admitted that she knew she had a problem at that time and that she was the cause of a lot of the problems she experienced, it is merely lay evidence and is limited to Hall's hindsight perspective. Except for the scant evidence of this single episode of work-related stress, Hall adduced no compelling evidence to support a finding of mental disability or handicap. There is no indication that Hall suffered from any type of true emotional or mental disorder.

In Daley v. Koch, 892 F.2d 212 (2d Cir. 1989), a police officer candidate who was rejected because a psychologist found that he had shown poor judgment,

irresponsible behavior, and poor impulse control was not an individual with handicaps under the federal Rehabilitation Act, because he was not diagnosed with any particular psychological disease or disorder, nor was there evidence that the employer had perceived him to be suffering from such a disorder.

Savings submits that Hall's problems were similar to those of the officer candidate in Daley. Thus, although Hall had personality problems and was under stress, she was not "disabled" under TCHRA. We agree.

Disabled by Carpal Tunnel?

Turning now to the question of whether Hall was handicapped by carpal tunnel syndrome, we note that there are no reported Texas cases in which carpal tunnel syndrome had been recognized as a disability or handicap under TCHRA. However, our review of cases under the Americans with Disability Act and cases under other states' disability discrimination statutes reveal that in some cases, carpal tunnel syndrome may rise to the level of a disability, depending on the severity of the case.

To sustain an action under TCHRA, a plaintiff claiming handicap discrimination must establish three elements: (1) that he is a handicapped person as defined in the Act; (2) that he was discriminated against because of his handicap; and (3) that the decision to terminate him was based solely on this handicap. Elstner v. Southwestern Bell Tel. Co., 659 F.

Supp. 1328, 1345 (S.D. Tex. 1987), *aff'd,* 863 F.2d 881 (5th Cir. 1988).

TCHRA applies only to very severe handicaps -- "protecting persons with impairments of an incapacitating nature. Chevron Corp. v. Redmon, 745 S.W.2d 314, 317-18 (Tex. 1987). In order for a disability to be considered a handicap it must be one which is "generally perceived as severely limiting in performing work-related functions in general." Chandler v. City of Dallas, 2 F.3d 1385, 1397 (5th Cir. 1993), *citing* Chevron, *supra.* An employee is not necessarily handicapped just because he is incapable of satisfying the singular demands of a particular job. Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328, 1343 (S.D. Tex. 1987), aff'd, 863 F.2d 881 (5th Cir. 1988).

Although it is uncontroverted that Hall actually suffers from carpal tunnel syndrome, for which she had undergone two surgeries at the time she was fired, the evidence adduced at trial simply does not establish that Hall's carpal tunnel syndrome reached a major life activity or was substantially limiting. Hall described the difficulty and pain she suffered when she typed, braided her daughter's hair, and performed other daily chores. However, we are convinced that no reasonable jury could conclude that her situation rose to the level of a handicap under TCHRA. Hall's own doctor testified at trial that he did not consider her handicapped, and in his letter to her company and subsequent telephone conversation with Josephson, just weeks before Hall was terminated, the doctor said that she could return to work so long as she did not

have to engage in heavy lifting or full days of typing[11]. Hall's carpal tunnel syndrome simply does not rise to the level of a handicap or disability under the Texas statute. Accordingly, the jury verdict as to the TCHRA claim cannot stand.

CONCLUSION

We REVERSE and RENDER judgment in favor of Savings. Finding that the evidence does not support the jury verdict, we do not reach the other issues raised by appellant Savings. The motion to supplement the record on appeal is DENIED as moot, because the information sought to be supplemented therein pertained to an issue we do not reach.

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[11]There is no allegation that Hall's job required heavy lifting or full days of typing.

Appendix B

APPENDIX B - ORDER FILED OCTOBER 18, 1995 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60091

SANDRA R. HALL,

Plaintiff-Appellee,

versus

SAVINGS OF AMERICA,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas

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Appendix B

ON PETITION FOR REHEARING

(OCTOBER 18, 1995)

Before HIGGINBOTHAM, SMITH and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

REHG-2
Rev. 1/4/95

APPENDIX C - STATUTES INVOLVED IN THIS CASE

TITLE 28

Rule 50(b)

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

Appendix C

Ch. 1186, § 171ST LEGISLATURE-REGULAR SESSION

CHAPTER 1186

S.B. No. 479

AN ACT

relating to the continuation, powers, and duties of the Commission on Human Rights.

Be it enacted by-the Legislature of the State of Texas:

SECTION 1. Section 1.02, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 1.02. PURPOSES. The general purposes of this Act are:

(1) to provide for the execution of the policies embodied in Title VII of the federal Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000e et seq.), and to create an authority that meets the criteria under 42 U.S.C. Section 2000e-5(c) and 29 U.S.C. Section 633; and

(2) to secure for persons within the state, *including disabled persons*, freedom from discrimination in certain transactions concerning employment, and thereby to protect *the* [~~their interest in~~] personal dignity *of persons within the state*;

and to make available to the state *the* [~~their~~] full productive capacities *of those persons*, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of *persons* [~~individuals~~] within the state.

SECTION 2. Subsections (a) and (b), Section 1.04, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), are amended to read as follows:

(a) *Except as provided by Section 5.04 of this act, in* [~~In~~[this Act, "because of age" or "on the basis of age" refers only to discrimination because of age or on the basis of age against an individual 40 years of age or older [~~and under 70 years of age~~]. Nothing in this Act prohibits the compulsory retirement of any employee who has attained 65 years of age [~~but not 70 years of age~~], and who, for the two-year period immediately before retirement, is employed in a bona fide executive or high policy-making position, if the employee is entitled to an immediate, nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of plans, of the employer of the employee, that equals, in the aggregate, at least $ 27,000.

(b) In Article 5, "because of *disability* [~~handicap~~]" or "on the basis of *disability* [~~handicap~~]" refers to discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job.

Appendix C

SECTION 3. Section 2.01, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 2.01. DEFINITIONS. In this Act, unless the context otherwise requires:

(1) "Bona fide occupational qualification" means a qualification:

(A) that is reasonably related to the satisfactory performance of the duties of a job; and

(B) for which there is a factual basis for believing that *no* [~~a~~] person of the excluded group would be *able* [~~unable~~] to perform satisfactorily the duties of the job with safety or efficiency.

(2) "Commission" means the Commission on Human Rights created by this Act.

(3) "Commissioner" means a member of the commission.

(4) *"Disability" means a mental or physical impairment that substantially limits at least one major life activity or a record of such a mental or physical impairment. The term does not include:*

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(A) a person with a current condition of addiction to the use of alcohol or any drug or illegal or federally controlled substance; or

(B) a person with a currently communicable disease or infection, including but not limited to acquired immune deficiency syndrome or infection with the human immunodeficiency virus, that constitutes a direct threat to the health or safety of other persons or that makes the affected person unable to perform the duties of the person's employment.

(5) "Disabled" means having a disability.

(6) "Employee" means an individual employed by an employer, including an individual subject to the civil service laws of the state or a political subdivision of the state, except that the term "employee" does not include an individual elected by the qualified voters to public office in the state or a political subdivision of the state, an individual chosen by that officer to be on the officer's personal staff, an appointee on the policy-making level, or an immediate adviser with respect to the exercise of the constitutional or legal powers of public office.

(7)[~~(5)~~] "Employer" means:

(A) a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the

current or preceding calendar year and any agent of that person; *or*

(B) [~~. The term includes~~] a *county or municipality or* [~~political subdivision and~~] any state agency or instrumentality, including public institutions of [~~higher~~] education, *regardless of the number of individuals employed.*

(8) [~~(6)~~] "Employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to procure for employees opportunities to work for an employer, including an agent of that person.

(9) [~~(7)(A) "Handicapped person" means a person who has a mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, as defined in Section 121.002(4), Human Resources Code, but does not include a person because he is addicted to any drug or illegal or federally controlled substances or because he is addicted to the use of alcohol.~~

~~(B) "Handicap" means a condition either mental or physical that includes mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, as defined in Section 121.002(4), Human~~

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~~Resources Code, but does not include a condition of addiction to any drug or illegal or federally controlled substances or a condition of addiction to the use of alcohol.~~

~~(8)~~] "Labor Organization" means a labor organization engaged in an industry affecting commerce, and includes:

(A) any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment;

(B) any conference, general committee, joint or system board, or joint council so engaged that is subordinate to a national or international labor organization; and

(C) an agent of a labor organization.

(10) [~~(9)~~] "Local commission" means a commission on human relations created by one or more political subdivisions.

(11) [~~(10)~~] "National origin" includes the national origin of an ancestor.

(12) [~~(11)~~] "Person" means one or more individuals or an association, corporation, joint-stock company, labor union, legal representative, mutual company, partnership, receiver, trust, trustee, trustee in bankruptcy, unincorporated

organization, the state, or a political subdivision or agency of the state.

(13) [~~(12)~~] "Political subdivision" means a county or *municipality* ~~an incorporated city or town~~.

(14) [~~(13)~~] "Religion" means all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable reasonably to accommodate the religious observance or practice of an employee or applicant without undue hardship on the conduct of the employer's business.

SECTION 4. Section 3.01, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended by amending Subsection (a) and by adding Subsections (e) and (f) to read as follows:

(a) There is created the Commission on Human Rights to consist of six members. The governor shall appoint the commissioners with the advice and consent of the senate and designate one of the commissioners as chairman of the commission. One member of the commission shall be *a* representative of industry, one member shall be *a* representative of labor, and four members shall be *representatives of the general public* [~~appointed at large~~]. In making appointments, the governor shall strive to achieve representation on the commission that is diverse with respect to *disability, religion, age,* economic status, sex, race, and ethnicity.

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(e) a person is not eligible for appointment as a public member of the commission if the person or the person's spouse:

(1) is employed by or participates in the management of a business entity or other organization receiving funds from the commission;

(2) owns or controls, directly or indirectly, more than a 10 percent interest in a business entity or other organization receiving funds from the commission; or

(3) uses or receives a substantial amount of tangible goods, services, or funds from the commission, other than compensation or reimbursement authorized by law for commission membership, attendance, or expenses.

(f) a person may not serve as a member of the commission or act as the general counsel to the commission if the person is required to register as a lobbyist under chapter 305, Government Code, because of the person's activities for compensation on behalf of a profession related to the operation of the commission.

SECTION 5. The Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes) is amended by adding Section 3.011 to read as follows:

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Sec. 3.011. REMOVAL OF COMMISSION MEMBERS. (a) it is a ground for removal from the commission if a member:

(1) does not have at the time of appointment the qualifications required by subsection (a) or (e) of section 3.01 of this Act;

(2) does not maintain during service on the commission the qualifications required by subsection (a) or (e) of section 3.01 of this Act;

(3) violates a prohibition established by subsection (f) of section 3.01 of this Act;

(4) cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability; or

(5) is absent for more than half of the regularly scheduled commission meetings that the member is eligible to attend during a calendar year unless the absence is excused by majority vote of the commission.

(b) the validity of an action of the commission is not affected by the fact that it is taken when a ground for removal of a commission member exists.

(c) if the executive director has knowledge that a potential ground for removal exists, the executive director shall notify the chairman of the commission of the ground. The chairman shall then notify the governor that a potential ground for removal exists.

SECTION 6. Section 3.02, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 3.02. POWERS OF COMMISSION. *(a)* The commission has the following powers:

(1) to maintain an office in the city of Austin;

(2) to meet and exercise its powers at any place within the state[~~, except in any political subdivision having a local commission as described in Section 4.02 of this Act~~];

(3) to employ an executive director and authorize the employment of other staff members, including any necessary attorneys or clerks and other representatives or agents, and to fix the compensation of the executive director or other staff members, representatives, or agents;

(4) to promote the creation of local commissions on human rights and to cooperate or contract with individuals or state, local, or other agencies, both public and private, including agencies of the federal government and of other states;

(5) to accept public grants or private gifts, bequests, or other payments;

(6) to receive, investigate, seek to conciliate, and pass on complaints alleging violations of this Act, and file civil actions to effectuate the purposes of this Act;

(7) to request and, if necessary, compel by subpoena the attendance of necessary witnesses for examination under oath or affirmation, and the production, for inspection and copying, of records, documents, and other evidence relevant to the investigation of alleged violations of this Act. The commission by rule may authorize a commissioner or one of its staff to exercise the powers stated in this subdivision on behalf of the commission;

(8) to furnish technical assistance requested by a person subject to this Act to further compliance with the Act or with rules or orders issued under this Act;

(9) to render at least annually a comprehensive written report to the governor and to the legislature, which report may contain recommendations of the commission for legislative or other action to carry out the purposes and policies of this Act; and

(10) to adopt, issue, amend, and rescind procedural rules to carry out the purposes and policies of this Act.

(b) the commission shall file annually with the governor and the presiding officer of each house of the legislature a complete and detailed written report accounting for all funds received and disbursed by the commission during the preceding fiscal year. The annual report must be in the form and reported in the time provided by the General Appropriations Act.

(c) the commission shall prepare and maintain a written plan that describes how a disabled person or a person who does not speak English can be provided reasonable access to the commission's programs.

(d) the commission shall develop on a biennial basis an inventory of equal employment opportunity policies and programs adopted and implemented by the various state agencies. The commission shall conduct studies of the policies and programs of selected state agencies if directed to do so by a resolution of the legislature or by an executive order of the governor.

SECTION 7. Section 3.03, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 3.03. SUNSET PROVISION. The Commission on Human Rights is subject to the Texas Sunset Act (Chapter 325, Government Code). Unless continued in existence as provided

by that Act, the commission is abolished September 1, *2001* [~~1989~~].

SECTION 8. The Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes) is amended by adding Sections 3.04 and 3.05 to read as follows:

Sec. 3.04. Personnel. (a) the executive director or the executive director's designee shall develop an intraagency career ladder program. The program shall require intraagency posting of all nonentry level positions concurrently with any public posting.

(b) the executive director or the executive director's designee shall develop a system of annual performance evaluations. All merit pay for commission employees must be based on the system established under this subsection.

(c) the commission shall provide to its members and employees, as often as necessary, information regarding their qualifications for office or employment under this Act and their responsibilities under applicable laws relating to standards of conduct for state officers or employees.

(d) the executive director or the executive director's designee shall prepare and maintain a written policy statement to assure implementation of a program of equal employment opportunity under which all personnel transactions are made without regard to race, color, disability, sex, religion, age, or national origin. The policy statement must include:

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(1) personnel policies, including policies related to recruitment, evaluation, selection, appointment, training, and promotion of personnel;

(2) a comprehensive analysis of the commission work force that meets federal and state guidelines;

(3) procedures by which a determination can be made of significant underutilization in the commission work force of all persons for whom federal or state guidelines encourage a more equitable balance; and

(4) reasonable methods to appropriately address those areas of significant underutilization.

(e) a policy statement prepared under Subsection (d) must cover an annual period, be updated not less than annually, and be filed with the governor's office.

(f) the governor's office shall develop a biennial report to the legislature based on the information received under subsection (e). The report may be made separately or as a part of other biennial reports made to the legislature.

(g) the commission shall develop and implement policies that clearly define the respective responsibilities of the commission and the staff of the commission.

Sec. 3.05. PUBLIC INTEREST INFORMATION AND COMPLAINTS. (a) the commission shall prepare information

of public interest describing the functions of the commission and the commission's procedures by which complaints are filed with and resolved by the commission. The commission shall make the information available to the public and appropriate state agencies.

(b) if a written complaint is filed with the commission that the commission has authority to resolve, the commission, at least quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation by another agency of the state, federal, or local government.

(c) the commission shall develop and implement policies that provide the public with a reasonable opportunity to appear before the commission.

SECTION 9. Section 4.02, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 4.02. LOCAL COMMISSIONS. A political subdivision or two or more political subdivisions acting jointly may create a local commission to promote the purposes of this Act and to secure for all individuals within the jurisdiction of the political subdivision or subdivisions freedom from discrimination because of race, color, *disability* [~~handicap~~],

religion, sex, national origin, or age and may appropriate funds for the expenses of the local commission.

SECTION 10. Subsection (a), Section 4.04, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

(a) The state commission shall refer a complaint filed with it to a local commission with the necessary investigatory and conciliatory powers if the complaint concerns discrimination in employment because of race, color, *disability* [~~handicap~~], religion, sex, national origin, or age, and:

(1) the complaint has been referred to the state commission by the federal government; or

(2) the jurisdiction over the subject matter of the complaint has been deferred to the state commission by the federal government.

SECTION 11. Section 5.01, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 5.01. EMPLOYERS. It is an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge an individual or otherwise to discriminate against an individual with respect to compensation or the terms,

conditions, or privileges of employment because of race, color, *disability* [~~handicap~~], religion, sex, national origin, or age; or

(2) to limit, segregate, or classify an employee or applicant for employment in a way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee because of race, color, *disability* [~~handicap~~], religion, sex, national origin, or age.

SECTION 12. Section 5.02, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 5.02. EMPLOYMENT AGENCIES. It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment or otherwise to discriminate against an individual because of race, color, *disability* [~~handicap~~], religion, sex, national origin, or age, or to classify or refer for employment an individual on the basis of race, color, *disability* [~~handicap~~], religion, sex, national origin, or age.

SECTION 13. Section 5.03, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

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Sec. 5.03. LABOR ORGANIZATIONS. It is an unlawful employment practice for a labor organization:

(1) to exclude or to expel from membership or otherwise to discriminate against an individual because of race, color, *disability* [~~handicap~~], religion, sex, national origin, or age;

(2) to limit, segregate, or classify members or applicants for membership or to classify or to fail or refuse to refer for employment an individual because of race, color, *disability* [~~handicap~~], religion, sex, national origin, or age in a way:

(A) that would deprive or tend to deprive an individual of employment opportunities; or

(B) that would limit employment opportunities or otherwise adversely affect the status of an employee or of an applicant for employment; or

(3) that would cause or attempt to cause an employer to violate this article.

SECTION 14. Section 5.04, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 5.04. TRAINING PROGRAMS. *(a)* Unless the training or retraining opportunities or programs are provided

under an affirmative action plan approved according to federal law, rule, or order, it is an unlawful employment practice for an employer, labor organization, or joint labor-management committee controlling an apprenticeship, on-the-job, or other training or retraining program to discriminate against an individual because of *disability, age,* race, color, religion, sex, or national origin in admission to or participation in a program established to provide apprenticeship, on-the-job, or other training or retraining opportunities.

(b) for the purposes of this section, "because of age" refers only to discrimination because of age against an individual who is at least 40 years of age but younger than 56 years of age.

SECTION 15. Subsection (b), Section 5.05, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

(b) Unless *disability* [~~handicap~~], religion, sex, national origin, or age is a bona fide occupational qualification, it is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling an apprenticeship, on-the-job, or other training or retraining program to print or publish or cause to be printed or published a notice or advertisement relating to employment indicating a preference, limitation, specification, or discrimination based on race, color, *disability* [~~handicap~~], religion, sex, national origin, or age, if the notice or advertisement concerns an employee's status, employment, or

admission to or membership or participation in a labor union or an apprenticeship, on-the-job, or other training or retraining program.

SECTION 16. Subsection (a), Section 5.07, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

(a) Notwithstanding any other provision of this article, it is not an unlawful employment practice:

(1) for an employer to hire and to employ employees, for an employment agency to classify or refer for employment an individual, for a labor organization to classify its members or to classify or refer for employment an individual, or for an employer, labor organization, or joint labor-management committee controlling an apprenticeship, on-the-job, or other training or retraining program to admit or employ an individual in its program, on the basis of *disability* [~~handicap~~], religion, sex, national origin, or age, if *disability* [~~handicap~~], religion, sex, national origin, or age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise;

(2) for a religious *corporation, association, society, or* educational institution or an educational organization operated, supervised, or controlled, in whole or in substantial part, by a religious corporation, association, or

society to limit employment or give preference to members of the same religion;

(3) for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment under a bona fide seniority system, bona fide merit system, or a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade this Act, or under a system that measures earnings by quantity or quality of production if those different standards are not discriminatory on the basis of race, color, *disability* [~~handicap~~], religion, sex, national origin, or age, except that no employee benefit plan may excuse a failure to hire on the basis of age and no seniority or employee benefit plan may require or permit involuntary retirement on the basis of age;

(4) for an employer to apply to employees who work in different locations different standards of compensation or different terms, conditions, or privileges of employment if those different standards are not discriminatory on the basis of race, color, *disability* [~~handicap~~], religion, sex, national origin, or age;

(5) for an employer to impose minimum or maximum age requirements for peace officers or fire fighters;

(6) for a public school official to adopt or implement a plan reasonably designed to end discriminatory school practices; or

(7) for an employer to engage in any practice that has a discriminatory effect and that would otherwise be prohibited by this Act if the employer establishes that the practice is not intentionally devised or operated to contravene the prohibitions of this Act and is justified by business necessity.

SECTION 17. Section 5.09, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 5.09. IMBALANCE PLANS. This Act may not be interpreted to require a person subject to this Act to grant preferential treatment to an individual or to a group on the basis of the race, color, *disability* [~~handicap~~], religion, sex, national origin, or age of that individual or group because an imbalance exists between the total number or percentage of persons of that individual's or group's race, color, *disability* [~~handicap~~], religion, sex, national origin, or age employed by an employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by a labor organization, or admitted to or employed in any apprenticeship, on-the-job, or other training or retraining program, and the total number or percentage of persons of that race, color, *disability* [~~handicap~~], religion, sex, national origin, or age in any community, this state, region, or other area, or in the available work force in any community, this state, region, or other area.

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SECTION 18. Subsection (d), Section 6.01, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

(d) A showing of undue hardship by the respondent is a defense to a complaint of discrimination made by an employee or applicant based on *disability* [~~handicap~~]. With respect to a complaint based on *disability* [~~handicap~~], the commission's order must take into account the reasonableness of the cost of any necessary work place accommodation and the availability of alternatives or other appropriate relief.

SECTION 19. Section 7.01, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended by amending Subsections (a), (d), (e), and (f) and by adding Subsection (i) to read as follows:

(a) If the commission has made a determination that there is reasonable cause to believe that the respondent has engaged in an unlawful employment practice, and the commission's efforts to resolve the discriminatory practice to the satisfaction of the complainant and respondent through conciliation have been unsuccessful, the commission may bring a civil action against the respondent named in the charge if a majority of the commissioners determine that the civil action may effectuate the purposes of this Act. The complainant has the right to intervene in a civil action brought by the commission. If the complaint filed with the commission pursuant to Section 6.01 of this Act is dismissed by the commission, or *is not resolved before the expiration of the 180th day* [~~if within 180 days~~]

after the date of filing of ~~the complaint [the commission has not filed a civil action under this section or has not successfully negotiated a conciliation agreement between the complainant and respondent~~], the commission shall so *inform* [~~notify~~] the complainant in writing by certified mail. *A complainant who is so informed is entitled to request from the commission a written notice of the complainant's right to file a civil action. The complainant must request the notice in writing. On receipt of a written request by a complainant, the commission shall issue the notice of the right to file a civil action before the expiration of the 180th day after the date the complaint was filed if the complainant alleges an unlawful employment practice based on the complainant's status as an individual with a life-threatening illness, as confirmed in writing by a physician licensed to practice medicine in this state, or if the executive director certifies that administrative processing of the complaint cannot be completed before the expiration of the 180th day after the date the complaint was filed. The commission shall issue the expedited notice by certified mail not later than the fifth business day after the date the commission receives the written request. The executive director may issue the notice on behalf of the commission.* Within 60 days after the date of receipt of the notice, a civil action may be brought by the complainant against the respondent named in the charge. After timely application, the court may in its discretion permit the commission to intervene in any civil action filed under this subsection on certification that the case is of general public importance and if the commission has, before commencement of the civil action by the complainant, issued a determination

of reasonable cause to believe that the Act has been violated. In no event may any action be brought pursuant to this article more than one year after the date of filing of the complaint to which the action relates.

(d) Additional equitable relief may include but is not limited to:

(1) the hiring or reinstatement, with or without back pay, but back pay liability may not accrue for any date more than two years before the date of filing of a complaint with the commission, and interim earnings, *workers' compensation benefits,* and unemployment compensation benefits received shall operate to reduce the back pay otherwise allowable;

(2) the upgrading of employees with or without pay;

(3) the admission or restoration of union membership;

(4) the admission to or participation in a guidance program, apprenticeship, on-the-job, or other training or retraining program, with the use of objective job-related criteria in the admission of individuals to these programs;

(5) the reporting on the manner of compliance with the terms of a final order issued under this Act; and

(6) the payment of court costs.

(e) In any action or proceeding under this Act, the court in its discretion may allow the prevailing party, other than the commission, a reasonable attorney's fee as part of the costs. The state or an agency or a political subdivision of the state is liable for costs, *including attorney's fees,* to the same extent as a private person[~~, except that the state, a state agency, or a political subdivision is not liable for attorney's fees~~].

(f) In the case of *disabled* [~~handicapped~~] employees or applicants, the court must take into account the undue hardship defense, including the reasonableness of the cost of any necessary work place accommodation and the availability of alternatives or other appropriate relief.

(i) a failure to issue the notice of the complainant's right to file a civil action does not affect a complainant's right under subsection (a) of this section to bring a civil action against the respondent.

SECTION 20. Subsection (a), Section 8.02, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is amended to read as follows:

(a) An officer or employee of the commission may not make public any information obtained by the commission under its authority under Section 6.01 of this Act except as necessary to the conduct of a proceeding under this Act. *The commission shall adopt rules that allow a party to a complaint filed under section 6.01 reasonable access to the commission records relating to the complaint. Unless the complaint is*

resolved through a voluntary settlement or conciliation, the executive director shall, on the written request of a party, allow the party access to the commission records:

(1) following the final action of the commission; or

(2) if a civil action relating to the complaint has been filed in federal court alleging a violation of federal law.

SECTION 21. Section 10.04, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), is repealed.

SECTION 22. (a) This Act takes effect September 1, 1989.

(b) The changes in law made by this Act in the qualifications of members of the Commission on Human Rights apply only to a member appointed on or after September 1, 1989.

(c) The first policy statement required to be filed under Subsection (e), Section 3.04, Commission on Human Rights Act (Article 5221k, Vernon's Texas Civil Statutes), as added by this Act, must be filed before November 1, 1989.

SECTION 23. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several

days in each house be suspended, and this rule is hereby suspended.

Passed the Senate on April 11, 1989, by a viva-voce vote; May 19, 1989, Senate refused to concur in House amendments and requested appointment of Conference Committee; May 24, 1989, House granted request of the Senate; May 29, 1989, Senate adopted Conference Committee Report by a viva-voce vote; passed the House, with amendments, on May 18, 1989, by the following vote: Yeas 109, Nays 26, one present not voting; May 24, 1989, House granted request of the Senate for appointment of Conference Committee; May 29, 1989, House adopted Conference Committee Report by a non-record vote.

Approved June 16, 1989.

Effective Sept. 1, 1989.

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Labor Code

Art. 5221k Commission on Human Rights Act

ARTICLE 1. SHORT TITLE; DECLARATION OF PURPOSE; CONSTRUCTION

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Purposes

Sec. 1.02. The general purposes of this Act are:

(1) to provide for the execution of the policies embodied in Title VII of the federal Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000e et seq.), and to create an authority that meets the criteria under 42 U.S.C. Section 2000e-5(c) and 29 U.S.C. Section 633; and

(2) to secure for persons within the state, including disabled persons, freedom from discrimination in certain transactions concerning employment, and thereby to protect the personal dignity of persons within the state; and to make available to the state the full productive capacities of those persons, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of persons within the state.

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Sec. 1.02 amended by Acts 1989, 71st Leg., ch. 1186, 1, eff. Sept. 1, 1989.

* * * * * * * * * * *

Specific Rules of Construction

Sec. 1.04. (a) Except as provided by Section 5.04 of this Act, in this Act, "because of age" or "on the basis of age" refers only to discrimination because of age or on the basis of age against an individual 40 years of age or older. Nothing in this Act prohibits the compulsory retirement of any employee who has attained 65 years of age, and who, for the two-year period immediately before retirement, is employed in a bona fide executive or high policy-making position, if the employee is entitled to an immediate, nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of plans, of the employer of the employee, that equals, in the aggregate, at least $27,000.

(b) In Article 5, "because of disability" or "on the basis of disability" refers to discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job.

Sec. 1.04 amended by Acts 1989, 71st Leg. Ch. 1186 Section 2, eff. Sept. 1, 1989

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ARTICLE 2. GENERAL DEFINITIONS

Definitions

Sec. 2.01. In this Act, unless the context otherwise requires:

(1) "Bona fide occupational qualification" means a qualification:

(A) that is reasonably related to the satisfactory performance of the duties of a job; and

(B) for which there is a factual basis for believing that no person of the excluded group would be able to perform satisfactorily the duties of the job with safety or efficiency.

(2) "Commission" means the Commission on Human Rights created by this Act.

(3) "Commissioner" means a member of the commission.

(4) "Disability" means a mental or physical impairment that substantially limits at least one major life activity or a record of such a mental or physical impairment. The term does not include:

(A) a person with a current condition of addiction to the use of alcohol or any drug or illegal or federally controlled substance; or

(B) a person with a currently communicable disease or infection, including but not limited to acquired immune deficiency syndrome or infection with the human immunodeficiency virus, that constitutes a direct threat to the health or safety of other persons or that makes the affected person unable to perform the duties of the person's employment.

(5) "Disabled" means having a disability.

(6) "Employee" means an individual employed by an employer, including an individual subject to the civil service laws of the state or a political subdivision of the state, except that the term "employee" does not include an individual elected by the qualified voters to public office in the state or a political subdivision of the state, an individual chosen by that officer to be on the officer's personal staff, an appointee on the policy-making level, or an immediate adviser with respect to the exercise of the constitutional or legal powers of public office.

(7) "Employer" means:

(A) a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of that person; or

(B) a county or municipality or any state agency or instrumentality, including public institutions of education, regardless of the number of individuals employed.

(8) "Employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to procure for employees opportunities to work for an employer, including an agent of that person.

(9) "Labor Organization" means a labor organization engaged in an industry affecting commerce, and includes:

(A) any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment;

(B) any conference, general committee, joint or system board, or joint council so engaged that is subordinate to a national or international labor organization; and

(C) an agent of a labor organization.

(10) "Local commission" means a commission on human relations created by one or more political subdivisions.

(11) "National origin" includes the national origin of an ancestor.

(12) "Person" means one or more individuals or an association, corporation, joint-stock company, labor union, legal representative, mutual company, partnership, receiver, trust, trustee, trustee in bankruptcy, unincorporated organization, the state, or a political subdivision or agency of the state.

(13) "Political subdivision" means a county or municipality.

(14) "Religion" means all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable reasonably to accommodate the religious observance or practice of an employee or applicant without undue hardship on the conduct of the employer's business.

Sec. 2.01 amended by Act 1989, 71st Leg., ch. 1186, § 3, eff. Sept. 1, 1989.

ARTICLE 3. COMMISSION ON HUMAN RIGHTS: CREATION; POWERS

Commission on Human Rights

Sec. 3.01. (a) There is created the Commission on Human Rights to consist of six members. The governor shall appoint

the commissioners with the advice and consent of the senate and designate one of the commissions as chairman of the commission. One member of the commission shall be a representative of industry, one member shall be a representative of labor, and four members shall be representatives of the general public. In making appointments, the governor shall strive to achieve representation on the commission that is diverse with respect to disability, religion, age, economic status, sex, race, and ethnicity.

* * * * * * * * * * *

(e) A policy statement prepared under Subsection (d) must cover an annual period, updated not less than annually, and be filed with the governor's office.

(f) The governor's office shall develop a biennial report to the legislature based on the information received under Subsection (e). The report may be made separately or as part of other biennial reports made to the legislature.

(g) The commission shall develop and implement policies that clearly define the respective responsibilities of the commission and the staff of the commission.

Sec. 3.04 added by Acts 1989, 71st Leg., ch. 1186, § 8, eff. Sept. 1, 1989.

Appendix C

Public Interest Information and Complaints

Sec. 3.05. (a) The commission shall prepare information of public interest describing the functions of the commission and the commissions's procedures by which complaints are filed with and resolved by the commission. The commission's shall make the information available to the public and appropriate state agencies.

(b) If a written complaint is filed with the commission that the commission has authority to resolve, the commission, at least quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation by another agency of the state, federal, or local government.

(c) The commission shall develop and implement policies that provide the public with a reasonable opportunity to appear before the commission.

Sec. 3.05 added by Acts 1989, 71st Leg., ch. 1186, 8, eff. Sept. 1, 1989.

ARTICLE 4. LOCAL COMMISSIONS

* * * * * * * * * * *

Appendix C

Local Commissions

Sec. 4.02. A political subdivision or two or more political subdivisions acting jointly may create a local commission to promote the purposes of this Act and to secure for all individuals within the jurisdiction of the political subdivision or subdivisions freedom from discrimination because of race, color, disability, religion, sex, national origin, or age and may appropriate funds for the expenses of the local commission.

Sec. 4.02 amended by Acts 1989, 71st Leg., ch. 1186, § 9, eff. Sept. 1, 1989.

* * * * * * * * * * *

Referral to Local Commission

Sec. 4.04. (a) The state commission shall refer a complaint filed with it to a local commission with the necessary investigatory and conciliatory powers if the complaint concerns discrimination in employment because of race, color, disability, religion, sex, national origin, or age, and:

(1) the complaint has been referred to the state commission by the federal government, or

(2) the jurisdiction over the subject matter of the complaint has been deferred to the state commission by the federal government.

Appendix C

* * * * * * * * * * *

Sex. 4.04(a) amended by Acts 1989, 71st Leg., ch. 1186, § 10, eff. Sept. 1, 1989.

ARTICLE 5. DISCRIMINATION IN EMPLOYMENT

Employers

Sec. 5.01. It is an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge an individual or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, disability, religion, sex, national origin, or age, or

(2) to limit, segregate, or classify an employee or applicant for employment in a way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee because of race, color, disability, religion, sex, national origin, or age.

Sec. 5.01 amended by Acts 1989, 71st Leg., ch. 1186, § 11, eff. Sept. 1, 1989.

Employment Agencies

Appendix C

Sec. 5.02. It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment or otherwise to discriminate against an individual because of race, color, disability, religion, sex, national origin, or age.

Sec. 5.02 amended by Acts 1989, 71st Leg., ch. 1186, § 12, eff. Sept. 1, 1989.

Labor Organizations

Sec. 5.03. It is an unlawful employment practice for a labor organization:

(1) to exclude or to expel from membership or otherwise to discriminate against an individual because of race, color, disability, religion, sex, national origin, or age;

(2) to limit, segregate, or classify members or applicants for membership or to classify or to fail or refuse to refer for employment an individual because of race, color, disability, religion, sex, national origin, or age in a way:

(A) that would deprive or tend to deprive an individual of employment opportunities; or

(B) that would limit employment opportunities or otherwise adversely affect the status of an employee or of an applicant for employment; or

(3) that would cause or attempt to cause an employer to violate this article.

Sec. 5.03 amended by Acts 1989, 71st Leg., ch. 1186, § 13, eff. Sept. 1, 1989.

Training Program

Sec. 5.04. (a) Unless the training or retraining opportunities or programs are provided under an affirmative action plan approved according to federal law, rule, or order it is an unlawful employment practice for an employer, labor organization, or joint labor-management committee controlling an apprenticeship, on-the-job, or other training or retraining program to discriminate against an individual because of disability, age, race, color, religion, sex, or national origin in admission to or participation in a program established to provide apprenticeship, on-the-job, or other training or retraining opportunities.

(b) For the purpose of this section, "because of age" refers only to discrimination because of age against an individual who is at least 40 years of age but younger than 56 years of age.

Sec. 5.04 amended by Acts 1989, 71st Leg., ch. 1186, & 14, eff. Sept. 1, 1989.

Other Discriminatory Employment Practices

Appendix C

Sec. 5.05.

* * * * * * * * * * *

(b) Unless disability, religion, sex, national origin, or age is a bona fide occupational qualification, it is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling an apprenticeship, on-the-job, or other training or retraining program to print or publish or cause to be printed or published a notice or advertisement relating to employment indicating a preference, limitation, specification, or discrimination based on race, color, disability, religion, sex, national origin, or age, if the notice or advertisement concerns an employee's status, employment, or admission to or membership or participation in a labor union or an apprenticeship, on-the-job, or other training or retraining program.

Sec. 5.05(b) amended by Acts 1989, 71st Leg., ch. 1186, § 15, eff. Sept. 1, 1989.

* * * * * * * * * * *

Appendix D

APPENDIX D - APPELLANT RECORD PLAINTIFF'S REC. EXC. TAB N, PP 59-63, TRIAL TRANSCRIPT EXCERPTS OF PP. 470-471; 568-569

[BANK ATTORNEY]: There's no evidence and insufficient evidence to support the allegation that plaintiffs trouble stemmed from the filing of any workers' comp claim or have any protected disability pursuant to the Texas Commission on Human Rights Act.

I would also move for instructed directed verdict because there is no disability, no evidence of disability as defined and as protected pursuant to the Texas Commission on Human Rights Act.

I would also move for instructed directed verdict because there is no evidence of a duty to make reasonable accommodations; and yet as a mater of law, reasonable accommodation, more than reasonable accommodation has been the subject of this evidentiary record and proven.

What else? There was one other thing, if I can just think a second.

THE COURT: Let me emphasize, to the extent that you may have missed something, you have the right to supplement your motion at the completion of the case and its timely in all elements under Rule 50 (a)(2). So I'm not going

to preclude you. You may supplement on anything appropriate.

But on the basis of the totality of the evidence thus far, the Court does feel that the plaintiff has stated a sufficient prima facie case on the stated allegations that have made the basis of the pleadings and pretrial order heretofore filed in the court, and the Court is going to allow the plaintiff to go to the jury on the matters set out on the Court's proposed charge and the verdict form as we have previously discussed.

* * * * *

[BANK ATTORNEY] . . . Comes now Savings of America, defendant, and requests judgment entry by the Court on grounds that plaintiff has failed to produce evidence of a disability in this case, as that term is defined in the Texas Commission of Human Rights Act.

THE COURT: That motion is respectfully denied. The Court feels rather strongly that plaintiff has demonstrated rather compelling testimony of such stated statutorily mandated or defined disability. Consequently the motion is denied.

Anything further for plaintiff?

[HALL'S ATTORNEY]: No, Your Honor. Thank you.

Appendix D

THE COURT: All right. And anything further for defendant?

[BANK'S ATTORNEY]: Nothing, Your Honor.

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

No. 95-1132

In The

Supreme Court of the United States

October Term, 1995

SANDRA R. HALL,

Petitioner,

v.

SAVINGS OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals correctly determined that Savings of America complied with the purposes of Federal Rule of Civil Procedure 50(b), where Savings' counsel alerted both the district court and opposing counsel to allegations of insufficient evidence, and where the district court acknowledged Savings' motion as "timely"?

2. Whether, under Texas law, the Fifth Circuit appropriately relied in part on federal standards for guidance in defining "disability"?

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STATEMENT OF THE CASE

The Fifth Circuit found that Sandra R. Hall's ("Hall") state law claims against Savings of America ("Savings") were not supported by sufficient evidence. *Hall v. Savings of America*, No. 94-60091 (5th Cir. Sept. 14, 1995), Pet. Br. App. A. In an unpublished opinion, the Circuit Court held that Hall had failed to show a causal connection between her termination and the filing of a worker's compensation claim. Pet. Br. App. A at 19. The Circuit Court also found that neither condition of which Hall complained – carpal tunnel syndrome and emotional difficulty – constituted a "disability" as defined by the Texas Commission on Human Rights Act (TCHRA), Tex. Lab. Code. Ann. §§ 21.001 *et seq.* (Supp. 1996). Pet. Br. App. A at 22, 24. The Circuit Court therefore reversed the judgment of the trial court. In her petition, Hall complains of the standard of review employed by the Circuit Court in reviewing her workers' compensation retaliation claim; her complaint rests on her argument that Savings failed to comply with Fed. R. Civ. P. 50(b). In addition, Hall argues that the Circuit Court misunderstood the definition of "disability" under the TCHRA.

At the close of Hall's case-in-chief, Savings moved for judgment as a matter of law on the retaliation claim. The trial judge twice assured Savings that its motion was "timely":

> Let me emphasize, to the extent that you have missed something, you have the right to supplement your motion at the completion of the case and its (sic) timely in all elements under Rule 50(a)(2). So I'm not going to preclude you. You may supplement on anything appropriate.

(Tr. VI; 471) The trial judge then assured Savings:

> But I acknowledge [Savings' motion at the close of Hall's case] submission on a timely basis *for all purposes*, and it constitutes the record for appellate scrutiny.

(Tr. VI; 472) (emphasis added).

After Savings presented its case, which consisted of just one witness comprising five pages in the record, it relied on the trial judge's assurance that its previous motion constituted "the record for appellate scrutiny." It did not "supplement" its previous motion on the retaliation claim. Savings did supplement its motion on the TCHRA claim and therefore, at the close of all the evidence, emphasized the absence of any evidence of a disability.

The Fifth Circuit determined that, by alerting both the district court and opposing counsel to the allegations of evidentiary insufficiency, Savings' counsel satisfied the purposes of Rule 50(b). Pet. Br. App. A at 13. The Fifth Circuit also determined that any procedural abnormality under Rule 50(b) was occasioned by the district court. Pet. Br. App. A at 13. Finally, the Fifth Circuit determined that neither Hall's emotional problems nor her carpal tunnel syndrome constituted a "disability" as defined in the TCHRA. Pet. Br. App. A at 22. The Fifth Circuit relied in part on case law developed under the Federal Rehabilitation Act. The Fifth Circuit accordingly entered judgment in favor of Savings on both of Hall's claims.

REASONS FOR DENYING THE WRIT

The Circuit Court properly determined that Savings complied with the purposes of Rule 50(b) and held the district court responsible for Savings' technical miscue. All of the circuit courts, *including* the Fifth Circuit, agree that litigants must comply with the purposes of Rule 50(b). The Fifth Circuit read Rule 50(b) to avoid placing technique before substance, but that reading does not place the Fifth Circuit at odds with any other circuit. Rather, the departure from Rule 50(b)'s technical demands represented a discretionary determination that, on the unique facts of this case, Rule 50(b)'s purposes had been served.

In addition, the Fifth Circuit correctly determined that Hall failed to adduce evidence of a "disability" as defined under the TCHRA. This determination is supported by abundant federal law. Hall offers no authority for her complaint that the definition of "disability" used by the Fifth Circuit was unduly restrictive. In any event, the appropriate forum to address that complaint was the Texas Supreme Court.

REVIEW IS UNWARRANTED BECAUSE THE DECISION OF THE CIRCUIT COURT WAS CORRECT. IT DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR ANY COURT OF APPEALS.

A. Circuit Courts, Including the Fifth Circuit, Uniformly Hold That Litigants Must Adhere to Rule 50(b).

All of the circuit courts demand adherence to Rule 50(b). As the Fifth Circuit has observed, "[i]t is well-

established law that the sufficiency of the evidence is *not reviewable on appeal* unless a motion for directed verdict was made in the trial court at the conclusion of all the evidence." *McCann v. Texas City Ref., Inc.*, 984 F.2d 667, 671 (5th Cir. 1993). The Fifth Circuit has long adhered to this rule. *Steverson v. Goldstein*, 24 F.3d 666, 669 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 731 (1995); *Wells v. State Farm Fire & Casualty Co.*, 993 F.2d 510, 512 (5th Cir. 1993); *Bunch v. Walter*, 673 F.2d 127, 131 (5th Cir. 1982); *Freimanis v. Sea-Land Serv., Inc.*, 654 F.2d 1155, 1161 (5th Cir. 1981); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978).

The other circuit courts also adhere to Rule 50(b). *See Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995); *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 186 (4th Cir. 1994); *Wang Labs., Inc. v. Toshiba Corp.*, 993 F.2d 858, 868-69 (Fed. Cir. 1993); *Jones v. Lewis*, 957 F.2d 260, 263 (6th Cir. 1992), *cert. denied*, 506 U.S. 841 (1992); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1458-59 (9th Cir. 1988); *Dancey Co. v. Borg-Warner Corp.*, 799 F.2d 717, 720-21 (11th Cir. 1986); *Johnson v. University of Wis.-Milwaukee*, 783 F.2d 59, 61 (7th Cir. 1986); *Della Grotta v. State of R.I.*, 781 F.2d 343, 349-50 (1st Cir. 1986); *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1478 (10th Cir. 1985); *Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 473 (2d Cir. 1985); *Myers v. Norfolk Livestock Mkt., Inc.*, 696 F.2d 555, 558 (8th Cir. 1982).

Accordingly, there is no conflict among the circuit courts concerning the application of Rule 50(b). Each Circuit Court expects a litigant to comply with the Rule in order to later challenge the sufficiency of the evidence after a jury verdict. Significantly, the three Circuits that

Hall suggests depart from Rule 50(b) – including the Fifth Circuit – have applied the rule to preclude evidentiary review. *See McCann*, 984 F.2d at 671 (holding a motion for directed verdict made at the close of plaintiff's evidence, without more, insufficient to preserve error under Rule 50(b)); *Wells*, 993 F.2d at 512 (same); *McGee v. Bauer*, 956 F.2d 730, 733 (7th Cir. 1992) (same). *See also Piesco v. Koch*, 12 F.3d 332, 341 (2d Cir. 1993).

Uniform adherence to Rule 50(b) is not compromised by the rare instance in which a circuit court excuses technical fault in light of substantive compliance, where the Rule's purposes have been served. *See, e.g., Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983) (holding that the purposes of Rule 50(b) were served by a motion for directed verdict made at the close of plaintiff's evidence), *cert. denied*, 465 U.S. 1026 (1984). The Fifth Circuit in *Bohrer* determined that, at minimum, Rule 50(b) requires a litigant to alert both opposing counsel and the district court to the allegation of evidentiary insufficiency before the case is submitted to the jury. 715 F.2d at 216. This "notice" serves two purposes. First, it provides the district court a chance to assess the sufficiency of the evidence so that the court may re-examine this question if the jury returns a verdict contrary to the movant. *Id.* The notice also gives opposing counsel a chance to cure any defects in proof. *Id.*

Indeed, the Fifth Circuit is not alone in its willingness to examine whether the purposes of Rule 50(b) have been served in rare cases of technical artlessness. Many of the circuit courts that Hall suggests demand "strict adherence" to Rule 50(b) have, like the Fifth Circuit, applied the Rule in light of whether its purposes have been

served. *See, e.g., Reeves v. Teuscher*, 881 F.2d 1495, 1498 (9th Cir. 1989) (holding that court's instruction to renew any directed verdict motions after the verdict excused failure to object at close of evidence); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1331 (6th Cir. 1988) (excusing failure to expressly move for directed verdict at close of all evidence where party stated that he would prefer to handle matters in a post-verdict motion if that became necessary); *Hughes v. Halifax County Sch. Bd.*, 855 F.2d 183, 187 (4th Cir. 1988) (party's failure to move for directed verdict at close of evidence not error where court indicated that it intended to overturn verdict if returned in favor of plaintiff), *cert. denied*, 488 U.S. 1042 (1989); *Armstrong v. Federal Nat'l Mortgage Ass'n*, 796 F.2d 366, 370 (10th Cir. 1986) (failure to move for directed verdict at close of evidence not error where party called only one witness after first directed verdict motion); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982) (failure to move for directed verdict at close of all evidence not error where court had earlier stated that it considered prior directed verdict motion renewed), *cert. denied*, 459 U.S. 1205 (1983). *See also Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 489 (3d Cir. 1991) (holding that litigant satisfied Rule 50(b) despite failure to precisely object to claim challenged on appeal where claim had been asserted in pretrial motion in limine).

And, as Hall concedes, both the Second and Seventh Circuits examine the purposes of Rule 50(b) as well. *See, e.g., McKinnon v. City of Berwyn*, 750 F.2d 1383, 1389-90 (7th Cir. 1984) (excusing failure to move for directed verdict at close of evidence where, among other things,

judge said he would reserve action on first directed verdict motion); *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 62 (2d Cir. 1988) (same), *cert. denied*, 488 U.S. 852 (1988).

Thus, the Fifth Circuit's application of Rule 50(b) in this case does not represent a departure from the Rule's requirements; neither does it present this Court with a circuit conflict. It was instead a recognition that this case presented unique facts requiring the Circuit Court to examine the purposes of Rule 50(b). *See, e.g., McKinnon*, 750 F.2d at 1390 (discussing the purposes of Rule 50(b) and the various factual scenarios that merit excusing technical noncompliance). Hall does not create a "circuit conflict" by citing the anomalous case. As is apparent from a glance at Fifth Circuit case law, the Fifth Circuit follows Rule 50(b), demanding "strict adherence" absent other circumstances. *Compare McCann*, 984 F.2d at 671, *with Bohrer*, 715 F.2d at 217. The difference in outcomes in these cases stems from the reviewing court's determination that, on different facts, the litigants have complied or failed to comply with Rule 50(b).

B. The Fifth Circuit Correctly Determined that Savings' Counsel Complied With Rule 50(b).

Savings alerted both the plaintiff and the district court to the allegation of evidentiary insufficiency on the workers' compensation retaliation claim, and the district court had the opportunity to re-examine this matter after the verdict. Thus, any technical miscue was of no consequence. Pet. Br. App. A at 13. Further, the Fifth Circuit found that the district court occasioned Savings' technical

miscue by "cut[ting] counsel short" and suggesting that counsel's motions were "timely . . . for all purposes," constituting "the record for appellate scrutiny." *Id.* The Fifth Circuit therefore properly assessed the sufficiency of the evidence supporting the jury's verdict. After determining that the evidence was insufficient to support either of Hall's claims, the Fifth Circuit entered judgment in favor of Savings.[1]

The Circuit Court considered its decision to be neither novel[2] nor complex and thus declined to publish the case. Pet. Br. App. A at 2 n.1. (The local rules permit a panel to decline publication for cases having "no precedential value" and merely applying "well-settled principles of law." *See* Fifth Circuit Local Rule 47.5.). The Fifth Circuit publishes opinions which it believes create "a conflict of authority." *Id.* Because the Circuit Court's opinion comports with the approach of the other circuit courts under Rule 50(b), this case does not merit Supreme Court review.

---

[1] Hall also suggests that the Fifth Circuit erred in rendering judgment instead of just reversing the award. She does not, however, offer any authority for this proposition. The cases that Hall relies upon hold that an appellate court may not render judgment unless the appellant has moved for a judgment notwithstanding the verdict in the lower court. *See, e.g., Matthias v. Bingley*, 906 F.2d 1047, 1051 (5th Cir. 1990). It is undisputed that Savings moved for a judgment notwithstanding the verdict in the district court. Accordingly, the Fifth Circuit was free to render judgment in Savings' favor.

[2] Employing a sufficiency of the evidence standard is consistent with Fifth Circuit precedent, because "the purposes of the rule have been served." Pet. Br. App. A at 13; *see Bohrer*, 715 F.2d at 217.

C. The Fifth Circuit's Interpretation of the TCHRA is Proper Under Texas Law.

The Fifth Circuit found that neither Hall's emotional condition nor her carpal tunnel syndrome qualified as a "disability" under the TCHRA. Pet. Br. App. A at 21, 23. In reaching this result, it relied in part upon federal authority. *See Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) (holding that "poor judgment, irresponsible behavior and poor impulse control" do not qualify for protection under the Act); *Elstner v. Southwestern Bell Tel. Co.*, 659 F. Supp. 1328, 1343 (S.D. Tex. 1987) (holding that a condition interfering with an ability to do a particular job does not establish a limitation on a major life activity), *aff'd* 863 F.2d 881 (5th Cir. 1988). The Fifth Circuit also relied, however, on a Texas Supreme Court opinion holding that the TCHRA applied only to very severe handicaps "of an incapacitating nature." *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 318 (Tex. 1987).

The Fifth Circuit's reliance on federal disability case law for guidance was proper. The Texas Supreme Court has held that courts may look to provisions of federal law when interpreting the TCHRA. *See Caballero v. Central Power & Light Co.*, 858 S.W.2d 359, 361 (Tex. 1993) (Texas courts may consider how the federal act is implemented under clauses similar to those at issue under the TCHRA). Indeed, the federal standard may be more generous than that which will develop in Texas. *See, e.g., Chevron Corp.*, 745 S.W.2d at 318 (observing that the Texas legislature declined to employ the broader definition of "handicap" in the Federal Rehabilitation Act).

Hall has not, in any event, adduced any authority for the proposition that the Fifth Circuit's holding contradicts Texas law. Neither intermediate state appellate case that Hall relies upon demonstrates that her conditions qualify for protection under the TCHRA. In *Central Power & Light Co. v. Caballero*, 804 S.W.2d 534, 537 (Tex. App. – San Antonio 1990), *rev'd on other grounds*, 858 S.W.2d 359 (Tex. 1993), the San Antonio court declined to apply the amended statute retroactively. In *Finney v. Baylor Medical Ctr. Grapevine*, 792 S.W.2d 859, 862 (Tex. App. – Fort Worth 1990, no writ), the Fort Worth court held that the plaintiff presented a fact issue on whether manic depression is a "handicap." Neither case supports Hall's claim that the Fifth Circuit failed to define "disability" properly.

As the Fifth Circuit recognized, Texas authority analyzing conditions such as Hall's is sparse. Pet. Br. App. A at 22. Hall's appropriate avenue for a definitive ruling on Texas law was a request for certification of the issue to the Texas Supreme Court. *See* Tex. R. App. P. 114 (certification appropriate for "questions of law of this state which may be determinative of the cause then pending and as to which it appears . . . that there is no controlling precedent in the decisions of the Supreme Court of Texas"). *See, e.g., Lucas v. United States*, 807 F.2d 414, 418 (5th Cir. 1986). Hall chose to forego this avenue and should not now be heard to complain of the Circuit Court's interpretation of Texas law.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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